IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

STATE OF MAINE, *Petitioner*,

v.

PERLEY MOULTON, JR., *Respondent*.

ON WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF THE STATE OF MAINE

BRIEF FOR RESPONDENT

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QUESTION PRESENTED

Whether the Sixth Amendment right to counsel is violated under *Massiah* v. *United States*, 377 U.S. 201 (1964), and *United States* v. *Henry*, 447 U.S. 264 (1980), where, in the course of an investigation of crimes for which a defendant has not yet been charged, the police obtain, as the result of interrogation by an undercover agent, in the absence of counsel, the defendant's incriminating statements about crimes for which he has already been charged?

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STATEMENT

Perley Moulton, Jr. was charged with four counts of Theft by Receiving[1] in two indictments returned by the Waldo County Grand Jury on April 7, 1981.[2] J.A. 8-12.[3] Within two days of indictment Mr. Moulton appeared in open court represented by retained counsel. J.A. 1-2.

While these indictments were pending and after Mr. Moulton obtained representation by counsel, J.A. 1-2, Maine law enforcement officers met with Gary Colson, a co-defendant of Mr. Moulton.[4] J.A. 25-29. Specifically, Gary Colson met with Robert Keating, Chief of the Belfast Police Department on November 4, 1982, in Stockton Springs, Maine, J.A. 25-26, and with Robert Keating and Rexford Kelley of the Maine State Police on November 9 and 10, 1982, in Bangor and Orono. J.A. 28-29. At these meetings Gary Colson expressed concern about anonymous threats he had received over the telephone. J.A. 27-28, 51-52, 87. Gary Colson agreed to cooperate with the State in return for a guarantee that no

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[1] 17-A M.R.S.A. §401.

[2] On January 21, 1983 two additional indictments were returned against Mr. Moulton charging Burglary (17-A M.R.S.A. §401), Arson (17-A M.R.S.A. §802), and two counts of Theft (17-A M.R.S.A. §353). The 1983 indictments, which were based in part on the information obtained through the surreptitious recording of Mr. Moulton's conversations, involved the same incidents which provided the basis for the 1981 indictments. The 1981 indictments were dismissed by the State on June 7, 1983. J.A. 1-2. Mr. Moulton was ultimately convicted of Burglary and two counts of Theft under the 1983 indictments. J.A. 4, 6.

[3] "J.A." refers to the Joint Appendix filed in this case.

[4] The State opposed Moulton's motion to sever his trial from Colson's during the period Colson was acting as an undercover agent for the State. J.A. 21-22.

addition charges would be brought against him.[5] Trial Tr. 293-95. At these meetings Colson also provided Chief Keating and Detective Kelley with information about the crimes with which he had been charged, about other criminal activities and about a discussion with Mr. Moulton concerning harming other witnesses. J.A. 29-32.

As a result of these discussions between police officials and Gary Colson, Chief Keating and Detective Kelley met with Assistant District Attorney William Anderson and decided to provide Gary Colson with a recording device to install on his telephone.[6] J.A. 76-77. The recording device was provided to Gary Colson on November 12, 1982. J.A. 76. This recording device was subsequently used to record three telephone conversations between Gary Colson and Perley Moulton, none of which were introduced at trial.

In the first recorded telephone conversation, which occurred on November 21, 1982, Colson and Moulton discussed their interests in Amway, the sale of Mr. Moulton's automobile, a trip to New York and other personal matters. The only reference to the pending criminal charges in that conversation is reproduced in full below:

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[5] Gary Colson confessed to arson, burglary, and multiple thefts with which he was never charged as a result of this aggreement with the State. Trial Tr. 293-94. Arson is a Class A crime, 17-A M.R.S.A. §802, punishable by up to 20 years imprisonment, 17-A M.R.S.A. §1252(2)(A). Burglary is at least a Class C offense, 17-A M.R.S.A. §401, punishable by up to 5 years imprisonment, 17-A M.R.S.A. §1252(2)(C). Punishment for theft, 17-A M.R.S.A. §353, is, in general, dependent upon the value of the property stolen, 17-A M.R.S.A. §362. Colson's deal with the authorities was of substantial value to him.

[6] These law enforcement officers knew Mr. Moulton was represented by counsel. J.A. 47-48.

[Colson]

G.[7] So have you heard anything from the lawyer?

[Moulton]

P. No, I ain't heard a word, not anything at all. You?

G. No, no. Quiet.

P. Yeah, very quiet. I don't know. So it doesn't look like it's gonna go on this month and it probably won't go next month, so it'll be the first of the year.

G. Yeah, just when you wanted it, right?

P. No, I don't want it.

G. That's what I'm saying.

P. Yeah, yeah, well, what the hell? So anyways, mm-mm.

G. Yeah, I really don't (Laughing)

P. I come up with a method.

G. You did?

P. Yeah, Some day I'd like to get together and talk to you about it.

G. You.

P. After, I have to I have to work out the details on it.

G. Yeah.

P. But ah, it's a method.

G. Oh,

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[7] The initail "G" is a reference to *Gary* Colson and the initial "P" to *Perley* Moulton.

P. I'm gonna be up around Christmas time anyways, so

G. Oh, ok!

P. Ok?

G. Ok.

P. That'll give you some time to think, ...-think

G. Ok.

P. Yeah.

G. Nothing you want to talk to me about right now then?

P. Oh no!

G. No.

P. Nothing yet it's just something that's been rolling in my brains.

G. G. Yeah.

P. Oh, you know, what the heck?

G. Well, that's ok.

P. Yeah, I gotta research it thoroughly. (Laughing)

P. Oh, a there ain't too much to talk about is there?

G. Not really, (Laughing) It's it's awful though isn't it? Hunh?

P. Yeah, I know it.

G. It really is.

11/21/82 Telephone Call, Tr. 4-5.[8]

[8] Chief Keating testified at the suppression hearing that he believed that Moulton's comment that he had "come up with a method" in this telephone conversation was a reference to a plan to eliminate witnesses. J.A. 88. There is nothing in the conversation which supports this interpretation, and events after the fact suggest that Moulton was talking about an approach to meeting the State's proof at trial.

The two subsequent telephone calls occurred on December 1 and December 14, 1982. Those conversations focused primarily on the common interests of Colson and Moulton in cars, in Amway and in the upcoming trial on the indictments pending against them. In the last telephone conversation Moulton and Colson arranged to meet the Sunday after Christmas. J.A. 109-112. The purpose of that meeting was to discuss a joint strategy in the upcoming criminal trial.[9] The only reference to some other topic was made by Colson in this exchange:

[Moulton]

P. You know, I'd like to get together.

[Colson]

G. Yeah, I want to talk to you about what you said earlier too. You had something in the works there.

P. Yeah.

G. Ok?

P. Oh yeah.

G. Yeah, alright, we can talk Sunday anyway.

J.A. 110.

[9] The portions of the last recorded telephone conversation reproduced in the Joint Appendix included references to reviewing "the whole plan" on December 26. J.A. 110. Read in the context of that entire conversation, the "plan" was the strategy to be followed in the upcoming joint criminal trial. 12/14/82 Telephone Call.

Chief Keating received the tapes of the telephone conversations between Colson and Moulton shortly after they were recorded. J.A. 82. After learning about the meeting planned between Colson and Moulton on December 26, 1982, he and other unnamed law enforcement officials decided to place a body wire transmitter on Gary Colson for the purpose of record that meeting. J.A. 84-85. It is reasonable to assume that a representative of the District Attorney's Office participated in this decision, as one had earlier participated in the decision to record the telephone conversations between Moulton and Colson. J.A. 76.

The purpose of the body wire recording of the December 26 meeting between Colson and Moulton was described by Chief Keating at the suppression hearing as follows:

> For two reasons—number (1) in my mind was his safety. At that point, he had received some threats; we did not know from whom those threats were coming; the risk that Perley might have realized that now Gary was cooperating with the Police, and (2) to see if we could hear and record any conversations about doing away with witnesses in the case or tampering with witnesses, trying to put pressure on witnesses, and for any other conversations that they might have. J.A. 85.

Gary Colson also testified at the suppression hearing that the reasons for the body wire were his safety and to record plans to do away with witnesses. J.A. 67. Colson admitted that Moulton had not threatened him and that he did not expect anything to happen at the December 26 meeting. J.A. 54-55.

Chief Keating testified at the suppression hearing that he and Detective Kelley instructed Gary Colson not to question Perley Moulton in the December 26 meeting,

"just be himself in his conversation." J.A. 87. Colson testified that he had been instructed "just to be myself." J.A. 62. The December 26 meeting occurred in Colson's home with Chief Keating and Detective Kelley within a couple of hundred yards listening to the conversation. J.A. 61-63, 92.

The discussion at the December 26 meeting primarily concerned preparation for the upcoming criminal trial. Portions of four pages of the 122-page transcript of the tape of the meeting contain a discussion of the issue of eliminating witnesses with poison darts. 12/26/82 Body Wire, Tr. 18-21. Early on in that discussion Moulton disclaims interest in going forward with the scheme. 12/26/82 Body Wire, Tr. 18 ("Yeah, but ah I don't think we ought to go for it."). This discussion ultimately evolves into joking about the difficulties in obtaining poison. 12/26/82 Body Wire, Tr. 20-21.

Several portions of the tapes of the December 26 meeting between Colson and Moulton were introduced into evidence against Moulton at his trial.[10] Trial Tr. 331-40. Those portions of the December 26 meeting introduced at trial are replete with interrogation of Perley Moulton, Jr. by Gary Colson as to details of the crimes for which both were currently under indictment. Colson continually asked specific questions of Moulton, or made statements designed to generate an incriminating response, including the following:

> [Colson] ". . . . . One I cannot remember Caps, just can't remember, I know it was in December, what night did we break into Lothrop Ford? What date?"

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[10] Transcripts of those portions of the tapes of the December 26 meeting introduced into evidence appear in the Joint Appendix at 113-151.

J.A. 114

[Colson] "How many times did we drill them fucking locks, hunh?"

J.A. 115

[Colson] "Oh shit, remember, remember when we took the pick up out through there and we, and we dumped all of the stuff off it, that truck out back. Then I drove it back and then we, then I dumped it into whatever pond it was out there."

J.A. 116

[Colson] ". . . Did you follow me, yah, you followed me up there, or did you, no. Yah, you did. O.K."

J.A. 120

[Colson] "O.K. there's another thing now we still don't know what date Lothrop Ford was broken into. O.K., we stole the Mustang on the 13th of December and we stole the dump truck on the 13th of January."

J.A. 124

[Colson] "Oh shh-what do you think killed us on this?"

J.A. 125

[Colson] "What time did we break in that night? Must have been early."

J.A. 134

[Colson] ". . . How many holes did you drill, sir?"

J.A. 135

[Colson] "Is it hard for you to talk on the phone?"

J.A. 139

[Colson] "See the thing is Caps, even how this reads you're still an accessory to it."

J.A. 150

Counsel for Moulton moved to suppress Moulton's statements to Colson, which motion was denied by a Justice of the Superior Court, J.A. 3, 5-6, 16-19; Pet. App. 43-49. The Maine Supreme Judicial Court unanimously reversed Moulton's convictions on the ground that his Sixth Amendment rights had been violated by the introduction into evidence of certain incriminating statements made by him during the December 26, 1982, meeting with Colson. Pet. App. 1-19. The standard applied by the Maine Supreme Judicial Court in reviewing the Superior Court Justice's ruling on the motion to suppress was whether there was rational support in the record for the conclusions of the Superior Court Justice. Pet. App. 12. The Maine Supreme Judicial Court acknowledged that there were legitimate purposes served by the police investigation of Moulton's alleged statements to Colson and other threats to witnesses. Pet. App. 12-13. The Court concluded that a proper motive did not immunize the incriminating statements used against Moulton from constitutional scrutiny. The Court reviewed the transcript of the Colson-Moulton meeting and concluded "that Colson was not merely a 'passive listener.'" Pet. App. 17. The Supreme Judicial Court determined that ". . . Colson frequently pressed Moulton for details of various thefts and in so doing elicited much incriminating information that the State later used at trial" and that Chief Keating should have anticipated that this would occur. Pet. App. 17-18. This was the essential basis upon which the Court held that Moulton's Sixth Amendment rights had been violated; the incriminating statements used against him at

trial had been deliberately elicited from him by an agent of the State.

SUMMARY OF ARGUMENT

The constitutional right to counsel of a defendant in a criminal action is fundamental to the fairness of the criminal justice process. *United States* v. *Morrison*, 449 U.S. 361, 364 (1980). This Court has recognized the significance of the role of counsel and accorded the right to counsel substantial protection. *See, e.g. Powell* v. *Alabama*, 287 U.S. 45 (1932); *Gideon* v. *Wainwright*, 372 U.S. 385 (1963); *Evitts* v. *Lucey*, ___ U.S. ___, 105 S. Ct. 830 (1985). Access to counsel is a defendant's key to obtaining information about his or her constitutional and other rights under law. As an advocate counsel is instrumental in asserting the rights and the interests of a defendant in the adversary criminal justice process. *United States* v. *Cronic*, ___ U.S. ___, 104 S. Ct. 2039, 2044 (1984).

The role of counsel is particularly important at trial and at certain "critical stages" of the criminal justice process. Among those stages which have been recognized by this Court as "critical" for the purpose of ensuring that the right to counsel is clearly understood and counsel is readily available, is the stage at which agents of the state undertake interrogation of a defendant concerning an offense with which he has been formally charged. *Massiah* v. *United States*, 377 U.S. 201 (1964); *Brewer* v. *Williams*, 430 U.S. 387 (1977).

The Maine Supreme Judicial Court correctly concluded that the police agent Colson obtained the incriminating statements which were introduced against Respondent Moulton at trial by pressing him for the details of the criminal offenses for which he was under indictment and

represented by counsel. The State can not disclaim the conduct of its agent, and the Maine Supreme Judicial Court is correct in its conclusion that this conduct should have been anticipated by the police officials involved.

Interrogation of a defendant charged in a criminal case generates the right to counsel by making the encounter between a defendant and a police agent a critical stage of the criminal justice process. The conduct in this case which led to the incriminating statements by Moulton is precisely the type of conduct which *Massiah*, *Brewer*, and *United States* v. *Henry*, 447 U.S. 264 (1980), sought to restrict.

If the State undertakes to use at trial incriminating statements obtained from a defendant after that defendant has been formally charged with the criminal offense for which he is being tried, the State should be required to establish by clear and convincing evidence at least, (1) that it had a legitimate purpose other than the continuing investigation of the pending criminal offense in sending a police agent against the defendant, and (2) that the conduct of the police agent related to and was consistent with that legitimate purpose. While the State in this case, as in *Massiah*, may have had a legitimate purpose in investigating Colson's allegations that Moulton had discussed eliminating witnesses, Colson's interrogation of Moulton about the details of the pending criminal offenese rendered the admission of portions of that interrogation into Moulton's trial a violation of Moulton's Sixth Amendment right to counsel.

ARGUMENT

I. THE STATE "DELIBERATELY ELICITS" INCRIMINATING STATEMENTS WHEN AN AGENT OF THE STATE CONDUCTS A SURREPTITIOUS INTERROGATION OF AN INDICTED DEFENDANT AS TO PENDING CRIMINAL OFFENSES.

A. The Incriminating Statements Of Respondent Moulton, Introduced At Trial, Were, To A Significant Extent, The Result Of Direct Questioning And Prompting By Gary Colson As To The Details Of The Pending Criminal Offenses.

As the Maine Supreme Judicial Court pointed out:

> A review of the transcript of the Colson-Moulton meeting makes clear that Colson was not merely a "passive listener." . . . Instead, Colson frequently pressed Moulton for details of various thefts and in so doing elicited much incriminating information that the State later used at trial. Pet. App. 17-18

In the transcripts of the portions of the tapes introduced as evidence in Moulton's trial, one frequently sees specific questions asked by Colson as to details of the pending criminal offenses. In a manner plainly designed to elicit incriminating admissions, Colson asked Moulton for dates (J.A. 114, 124), for times (J.A. 134), and a whole variety of other details (J.A. 115, 120, 125, 135). Moulton responded to these questions with unambiguous admissions of guilt.

In addition to asking questions, Colson prompted Moulton to talk about the details of the case and about his guilt. *See e.g.*, J.A. 116 (dumping truck into pond); J.A. 124-125 (details of Lothrop Ford break-in and cause of problems); J.A. 127 (details of theft of pick-up truck); J.A. 150 (general concern about pending cases). Colson asked Moulton to ask him questions about the details of the

offenses. J.A. 129. Colson asked Moulton if it is hard for him to talk on the telephone and then prompted him. J.A. 139-140. Colson described Moulton as an accessory to arson and then prompted him to respond. J.A. 150-151.

The overwhelming impression one is left with after reviewing the portions of the tapes of the December 26 meeting admitted into evidence against Moulton is that of an effective interrogation of Moulton about the details of the pending criminal offenses and Moulton's involvement in those offenses.

B. Gary Colson Was An Agent Of The State And The State Did Not Adequately Protect Against Colson's Interrogation Of Perley Moulton As To The Details Of Pending Criminal Offenses.

The Main Supreme Judicial Court concluded that the warning given by Maine law enforcement officials to Gary Colson not to question Moulton provided insufficient protection for Moulton's Sixth Amendment rights. Pet. App. 18.

This conclusion is best understood in the context of the entire relationship which these officials had with Gary Colson. In November, 1982, Gary Colson had thrown in his lot with Maine law enforcement officials. He had met several times with Chief Keating and Detective Kelley and had confessed his role in the criminal charges pending against him as well as in other criminal activities. J.A. 29-30, 74-76. He had made a deal with these law enforcement officials in return for agreeing to testify against Perley Moulton. Trial Tr. 293. His deal consisted of the State's promise that he would not be charged with any additional offenses. Apparently no promises were made in regard to sentencing on the charges then pending against Gary Colson.

By the time of the December 26th meeting between Colson and Moulton, Colson was fully cooperating with state law enforcement officials. He had recorded three telephone conversations with Perley Moulton and had promptly turned those tapes over to Chief Keating. J.A. 82-83. He had consented to and was fitted with a body wire transmitter for the purpose of broadcasting to law enforcement officials the discussions he had with Perley Moulton at the December 26 meeting. J.A. 84-86.

Because Colson had confessed his participation in the criminal offenses for which he had been indicted and because he had made no deal on sentencing for those offenses, Colson had committed himself in a substantial way to the mercy of Maine law enforcement officials. It would be expected that he would do his best to please those officials. He would be foolish to do anything else.

Maine law enforcement officials had an obvious interest in convicting Perley Moulton of the offenses with which he had been charged in addition to protecting witnesses allegedly threatened by Moulton. Gary Colson must have understood this. He must also have understood that his original allegations to law enforcement officials about Perley Moulton's threats against witnesses had received little or no support in the three recorded telephone conversations with Perley Moulton.[11] Up to the time of the

[11] Chief Keating testified at the suppression hearing that he believed that Moulton's comment that he had "come up with a method" in first recorded telephone conversation was a reference to a plan to eliminate witnesses. J.A. 88. There is nothing in the conversation that supports this interpretation and events after fact suggest that Moulton was talking about a method of meeting the State's proof at trial. The only other alleged reference to eliminating witnesses in the three telephone conversations is one made by Colson in the December 14 conversation about "something in the works." J.A. 110.

December 26 meeting Gary Colson had produced very little in the way of independent evidence against Perley Moulton.

Similarly, Maine law enforcement officials had received little or nothing to corroborate independently Gary Colson's allegations about Perley Moulton's threats against witnesses. Further, it must have been clear to those law enforcement officials from listening to tapes of the telephone conversations that the purpose of the December 26 meeting was to prepare for the upcoming consolidated trial of Colson and Moulton.[12]

During this period the State had opposed Moulton's motion to sever his trial from Colson's. J.A. 21-22. The Maine Supreme Court specifically found that Chief Keating should have anticipated that the pending criminal charges would be discussed at the December 26 meeting. Pet. App. 15-17. Indeed, Chief Keating admitted at the suppression hearing that he was aware that the cases for which Perley Moulton was under indictment would probably be discussed. J.A. 86.

Despite the circumstances which established that the purpose of the December 26 meeting was the discussion of trial strategy by two co-defendants, the State went ahead with the recording of the meeting. The testimony of Chief Keating at the suppression hearing suggests that Gary Colson was instructed "not to attempt to question Perley Moulton, just be himself in his conversation, that he could agree or disagree with anything that he said, ..." J.A.

[12] The portions of the last recorded telephone conversation reproduced in the appendix include references by Moulton to reviewing "the whole Plan" on December 26. J.A. 110. Read in the context of that entire conversation the "plan" was the strategy to be followed in the upcoming criminal trial. 12/14/82 Telephone Call.

87. Colson's recollection was that he was instructed "[j]ust to be myself." J.A. 61-62.

Gary Colson, by the time of the December 26 meeting, was functioning as an agent for the State and was in a precarious position with Maine law enforcement officials. Maine law enforcement officials were interested in convicting Perley Moulton. Given the circumstances of this case Gary Colson must have been aware of that interest. At a minimum Maine law enforcement officials did not adequately impress upon Colson the importance of avoiding direct questioning of Moulton in regard to the pending criminal offenses. They then took full advantage of the fruits of that questioning.

C. The Incriminating Statements Of Mr. Moulton That Were Introduced Against Him At His Trial Were "Deliberately Elicited" By The State.

The facts of *Massiah* v. *United States*, 377 U.S. 201 (1964), are strikingly similar to the facts of this case.[13] The cooperating undercover agent was an indicted co-defendant of Massiah. He had a history of association with Massiah and they were apparently friendly. In this case, Moulton and Colson were co-defendants and friends. In each case the incriminating statements were broadcast by a hidden transmitter to government agents hidden nearby. In each case the government asserted a law enforcement interest for its investigation other than merely gathering evidence in support of pending indictments.

The State and the United States as *amicus curiae* assert that *Massiah* may be distinguished from this case

[13] The last names of the undercover agents in both cases were the same, Colson. No relationship has yet been established between them.

because here the State arguably did not create the situation which induced the defendant's incriminating statements, and to the extent the State participated in the December 26 meeting, it was not for the purpose of obtaining post-indictment incriminating statements from Moulton. State's Br. 29-34, 36-37; U.S. Br. 7, 18-19.

In formulating its definition of elicitation the State ignores the context of the meeting and the actual conduct of the undercover agent in *Massiah* and in this case, both of which amount to ". . . interrogation by a government agent." 377 U.S. at 206 (quoting from 307 F.2d at 72-73).

The central issue in this case is whether the Sixth Amendment protects an individual who has been formally charged with a criminal offense from a surreptitious interrogation as to that offense by a person cooperating with the government. While the conduct and intentions of law enforcement officers regularly employed on a full-time basis by government are important in evaluating whether an indicted and represented defendant's Sixth Amendment rights have been violated, it is also essential to consider the conduct of the undercover agent of those law enforement officers. It is the conduct of the undercover agent which has a direct impact on the defendant. It is the conduct of that agent that directly "elicits" the incriminating statements from the defendant.

In each of the significant Sixth Amendment cases in this area, there was active involvement by law enforcement officers or their surrogate agents in directly eliciting incriminating statements. In *Massiah*, as noted above, this Court accepted a characterization of the encounter between Massiah and the undercover agent as an "interrogation." In *Brewer* v. *Williams*, 430 U.S. 387 (1977), this Court accepted the characterization of the so-called "Christian burial speech" as tantamount to interrogation.

As the Court described it in *Brewer*, ". . . the clear rule of *Massiah* is that once adversary proceedings have commenced against an individual, he has a right to legal representation when the government interrogates him." 430 U.S. at 401.

In *United States* v. *Henry*, 447 U.S. 264 (1980), the undercover agent had "some conversations" with Henry and "Henry's incriminating statements were 'the product of this conversation.'" 447 U.S. at 271. This Court in *Henry* stated explicitly its view that ". . . affirmative interrogation, absent waiver, would certainly satisfy *Massiah*." 447 U.S. at 271. For one Justice the requirement of at least "the functional equivalent of interrogation" was conduct necessary to the conclusion that the incriminating statements had been "deliberately elicited." 447 U.S. at 277 (Powell, J., concurring).

While the *Massiah* doctrine may extend to conduct on the part of government agents which does not constitute interrogation or its functional equivalent,[14] certainly conduct which constitutes interrogation is subject to the doctrine. The surreptitious *interrogation* of the defendant by a secret government agent in the absence of the defendant's attorney constitutes a most flagrant breach of the relationship between a defendant and his attorney.

The State and the United States contend that this Court should focus on the fact that Perley Moulton

[14] In *United States* v. *Henry*, this Court rejected the government's contention that *Brewer* modified the "deliberately elicited" test set forth in *Massiah*. 447 U.S. at 271. *See generally* Kamisar, *Brewer* v. *Williams, Massiah, and Miranda: What is "Interrogation"? When Does It Matter?*, 67 Geo. L. J. 1 (1978). In *Beatty* v. *United States*, 389 U.S. 45 (1967), this Court applied the *Massiah* doctrine in a case where the government agent had neither arranged the meeting nor interrogated the defendant in any manner.

arranged the December 26 meeting with Gary Colson and that the law enforcement officials involved did not expressly instruct Colson to seek incriminating statements from Moulton concerning the pending criminal charges against him. State's Br. 40-41; U.S. Br. 15-17.

The State is correct in its contention that Mr. Moulton arranged the December 26 meeting with Gary Colson. This one fact among many does not end the analysis. This Court in *Henry* held it:

> . . . irrelevant that in *Massiah* the agent had to arrange the meeting between Massiah and his codefendant while here the agents were fortunate enough to have an undercover informant already in close proximity to the accused. 447 U.S. at 272, n.10.

Colson was a codefendant of Moulton. He was a business associate and a friend. They were scheduled, at the State's insistence, to be tried together on the same criminal charges. They apparently had a history of close communication. The law enforcement officers involved in the Moulton case were indeed fortunate to have Gary Colson as a cooperating undercover agent. They could hardly help anticipating that there would be continuing contacts and conversations between Moulton and Colson. Provision of the telephone recording device to Colson early on with instructions to record telephone conversations with Perley Moulton illustrates that expectation on the part of law enforcement officials. J.A. 76-77, 97-98.

In *Beatty* v. *United States*, 389 U.S. 45 (1967), a meeting was suggested by the indicted defendant Beatty and the undercover agent merely attended the meeting with a federal law enforcement agent hidden in the trunk of the undercover agent's car. This Court reversed the decision of the Court of Appeals for the Fifth Circuit, which had found no violation of the Sixth Amendment, explicitly

relying on its decision in *Massiah*.[15] Because of the extensive interrogation of Moulton by undercover agent Gary Colson, this case is factually an even stronger case than *Beatty* for the application of the *Massiah* doctrine.[16]

While this Court has recognized "that the core purpose of the counsel guarantee was to assure 'Assistance' at trial, when the accused was confronted with both the intricacies of the law and the advocacy of the public prosecutor," this Court has consistently reaffirmed a role for counsel in certain pretrial confrontations between an agent of the government and a defendant against whom the criminal process has been formally invoked. *United States* v. *Ash*, 413 U.S. 300, 309, 311-312 (1973). This Court has suggested that the role of counsel at a pretrial surreptitious interrogation of a defendant might involve advising his client on his Fifth Amendment rights and

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[15] For a discussion of the significance of *Beatty*, see Dix, *Undercover Investigations and Police Rulemaking*, 53 Texas L. Rev. 203, 232-236 (1975). *See also* Kamisar, *Brewer* v. *Williams*, *Massiah and Miranda: What is "Interrogation"? When Does It Matter?*, 67 Geo. L. J. 1, 44 n.286 (1978).

[16] The United States attempts to undermine the force of *Beatty* by suggesting that *Beatty* was a summary disposition. U.S. Br. 17-18, n.12. The reversal of the Fifth Circuit decision in *Beatty* came within three years of the decision in *Massiah* and was based explicitly on *Massiah*. The suggestion by the United States that *Brewer* v. *Williams* supports the contention that *Beatty* did not extend the *Massiah* doctrine to the mere acquisition of statements from the defendant ignores the fact that *Brewer* did not involve an encounter with a secret government agent and this Court's comment in *Henry* that "we are not persuaded, as the Government contends, that *Brewer* v. *Williams*, 430 U.S. 387 (1977), modified *Massiah's* 'deliberately elicited' test." 447 U.S. at 271.

protecting him against prosecutorial overreaching. 413 U.S. at 312. This confrontation constitutes a critical stage in the criminal justice process because, like post-indictment line-ups, it has the potential "to settle the accused's fate and reduce the trial itself to a mere formality." *United States* v. *Wade*, 388 U.S. 218, 224 (1967); *United States v., Gouveia*, ___ U.S. ___, 104 S.Ct. 2292, 2298 (1984).

The suggestions by the State and the United States that this Court should not apply *Massiah* to protect Perley Moulton's Sixth Amendment right to counsel because Moulton arranged the meeting with Gary Colson at which Colson elicited Moulton's incriminating statements are formalism of the worst sort. The government should not be permitted to take advantage of an indicted and represented defendant at a meeting which comes about ostensibly at the initiative of the defendant but which reflects the close relationship and the common peril of the defendant and the undercover agent who is a co-defendant in a pending joint trial. As the Maine Supreme Judical Court suggested, "The fact that Moulton and Colson were friends and co-defendants was of central importance in this case." Pet. App. 15.

In short, it may be true, but it is trivial that Moulton arranged the December 26 meeting with Colson. The State did little to protect against Colson's interrogation of Moulton as to the details of the pending criminal offenses. The instructions given to Colson were vague. He was largely dependent on the good will of the law enforcement officials involved and it was clear to all concerned that the purpose of the December 26 meeting was to discuss strategy in the upcoming joint criminal trial. In the totality of the circumstances of this case, Mr. Moulton's Sixth Amendment right to counsel was violated by the State.

II. THE LEGITIMATE PURPOSE OF THE STATE IN INVESTIGATING ALLEGATIONS OF POSSIBLE FUTURE CRIMES SHOULD NOT IMMUNIZE FROM CONSTITUTIONAL SCRUTINY THE CONDUCT OF THE STATE'S UNDERCOVER AGENT IN OBTAINING INCRIMINATING STATEMENTS REGARDING PENDING CRIMINAL CHARGES.

This Court pointed out in *Massiah:*

> We do not question that in this case, as in many cases, it was entirely proper to continue an investigation of the suspected criminal activities of the defendant and his alleged confederates, even though the defendant had already been indicted. All that we hold is that the defendant's own incriminating statements, obtained by federal agents under the circumstances here disclosed, could not constitutionally be used by the prosecution as evidence against *him* at his trial. 377 U.S. at 207.

Certainly the State is not prohibited from investigating allegations of completed or proposed criminal conduct involving an individual formally charged with other criminal conduct. *Hoffa* v. *United States*, 385 U.S. 293 (1966). The question confronted in this case is whether the fact that the State was investigating allegations of other criminal conduct should immunize the conduct of its officers in failing to protect adequately against the elicitation of incriminating statements regarding pending offenses and the conduct of its agent in directly eliciting those statements.

The United States suggests that the language of *Massiah* quoted above should be read narrowly because an exception for a related crimes investigation would have "swallowed the rule" in the context of *Massiah*. U.S. Br. 23-24. This is true not only in the context of *Massiah* but also in the context of this case and, perhaps, most cases. If the government need only assert that it is investigating a

"related crime" in justification of its elicitation and use of incriminating statements regarding pending crimes, as a matter of practical impact there will be no *Massiah* rule.

The suggestion that an investigation of a new crime will legitimize the admission of incriminating statements relating to a pending offense has been explicitly rejected by at least one circuit. *Mealer* v. *Jones*, 741 F.2d 1451 (2d Cir. 1984), *cert. denied*, No. 84-6210 (April, 1985).[17]

In *Massiah* the government was investigating the source of narcotics, the intended buyer of narcotics, and the participants in a large and well-organized drug ring. 377 U.S. at 206. In this case the State was investigating threats against witnesses in a pending case. Other cases have involved government investigations of obstruction of justice and subornation of perjury in pending criminal cases. *See United States* v. *Darwin*, 757 F.2d 1193 (11th Cir. 1985); *Mealer* v. *Jones*, 741 F.2d 1451 (2d Cir. 1984), *cert. denied*, No. 84-6210 (Apr. 1, 1985); *United States* v. *DeWolf*, 696 F.2d 1 (1st Cir. 1982); *Grieco* v. *Meachum*, 533 F.2d 713 (1st Cir.), *cert. denied*, 429 U.S. 858 (1976).

In each of these cases there is an obvious relationship between the "new crime" investigated by the government

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[17] In *Mealer* the Second Circuit recognized a general prohibition based on *Massiah* on the admission of incriminating statements obtained after indictment despite the fact that the statements were obtained in investigation of a scheme to bribe a witness to the pending offense. The Second Circuit Court of Appeals did not regard the fact that Mealer had arranged the meeting with the undercover agent as dispositive of the *Massiah* claim. Nor did it regard the new crimes justification offered by the government as sufficient to avoid the prohibition of *Massiah*. This court need not go so far as did the Second Circuit Court of Appeals in *Mealer* to accept Respondent's position in this case that a new crimes investigation does not provide a blanket for the conduct of government agents.

and the pending crime with which the defendant under investigation had been charged. This relationship often makes it difficult to separate out incriminating statements relating to pending crimes from evidence of new crimes. So, for example, in *United States* v. *Darwin*, Darwin was jointly tried for the pending crime (drug charges) and the "new crime" (obstruction of justice). Incriminating statements obtained during the investigation of the new crime were admitted at the trial without limitation. Most of those incriminating statements concerned the new crime. The two statements concerning the old crime apparently came up during the discussion of the new crime. 757 F.2d at 1197. In this context, the Court of Appeals for the Eleventh Circuit held the statements admissible noting that "we conclude that the right to presence of counsel simply does not extend to a situation in which the defendant is engaged in the commission of a separate offense." 757 F.2d at 1200.

Similarly, in two First Circuit cases, *United States* v. *De Wolf* and *Grieco* v. *Meachum*, in which the government investigated efforts to intimidate and to bribe witnesses to obtain perjured testimony, and obtained incriminating statements, the court found no *Massiah* violation. However, in each case the court noted that those statements were not "innocuous except for their implication of consciousness of guilt of the prior crime." 696 F.2d at 3; 533 F.2d at 718. In *Grieco* v. *Meachum*, Judge Coffin explicitly suggested that the decision of the court might have been different if the incriminating statements only related to pending offenses. 533 F.2d at 718.

In each of these cases, the courts of appeals, while allowing the admission at the trial of the prior crime of incriminating statements obtained while charges concerning the prior crime were pending, concluded that

those incriminating statements were obtained while the defendant was actually engaged in the commission of a new crime or the statements were in themselves incriminating as to both the prior crime and the new crime. None of these statements were simply incriminating statements relating to the pending crime elicited without reference or even relevance to the new crime investigation—the situation we have in *this* case.

This Court should not rule that a legitimate "other crimes" purpose on the part of law enforcement officers justifies the use of incriminating statements elicited while there are pending criminal charges regardless of how those statements are elicited or whether or not those statements are relevant to the "other crimes" investigation. Such a ruling would create a potential for subterfuge which would be difficult or impossible for a defendant to establish. Law enforcement officers will always be motivated to develop evidcence for a pending criminal case and it will be tempting indeed to initiate a new crimes investigation if the door is open to the use of any incriminating statements obtained in the course of that investigation at trial on the pending charge.[18] If the government can justify the admission of incriminating statements by showing merely that they were obtained in the context of an "other crimes" investigation, there will be little significance left to the rule of *Massiah* and *Henry*.

III. IN THE TOTALITY OF THE CIRCUMSTANCES OF THIS CASE THE STATE VIOLATED MOULTON'S SIXTH AMENDMENT RIGHT TO COUNSEL.

In the context of this case Moulton's Sixth Amendment right to counsel was violated when his incriminating

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[18] *See Dix, Undercover Investigations and Police Rulemaking*, 53 Texas L. Rev. 203, 234 (1975).

statements were admitted into evidence against him at trial. While Moulton arranged the meeting at which those incriminating statements were obtained, he was subject to surreptitious interrogation as to pending criminal charges by an agent of the State at that meeting. If there is any license provided to the State to obtain incriminating statements because the State is investigating some "other crime," the scope provided by that license was grossly exceeded in this case.

Maine law enforcement officials were aware that the pending criminal charges would be discussed at the December 26 meeting. They were well aware of the relationship between Moulton and Colson. They should have been aware of the obvious incentive Colson had to produce incriminating statements by Moulton for use in the trial of the pending criminal charges. They did little to protect against the blatant interrogation of Moulton which ultimately occurred at the December 26 meeting. In the words of the Maine Supreme Judicial Court "they intentionally created a situation that they knew, or should have known, was likely to result in Moulton's making incriminating statements during his meeting with Colson." Pet. App. 18. This case represents a clear violation of the standard set forth by this Court in *United States* v. *Henry*, 447 U.S. at 274.

If the government wishes to use at trial incriminating statements which were obtained by its agent once the formal adversary process has begun absent counsel or a valid waiver of counsel, at a minimum the government should be required to show, by clear and convincing evidence, that it had a legitimate purpose in sending its agent against the defendant, that is, a purpose other than merely obtaining evidence relating to the pending crime. The government should also be required to show that its

agent did not act outside the scope of the justification provided by its legitimate purpose in obtaining incriminating statements relating to a pending offense.

This approach would accommodate the values which *Massiah* and *Henry* sought to protect, the significance of the attorney-client relationship in our adversary system of criminal justice, and our sense of unfairness in the government seeking additional evidence surreptitiously from the defendant's own mouth once the formal adversary process has commenced. When the government obtains incriminating statements from a defendant relating to a pending offense for which the right to counsel has attached, it is only fitting that the government should bear a substantial burden in establishing that it had a legitimate purpose in dealing with the defendant and that its agent did not exceed that purpose in obtaining the incriminating statements.

This approach would also accommodate the societal interest in effective law enforcement by not only making clear that police officials may investigate new crimes despite a pending criminal offense, but also by allowing the use of incriminating statements at trial on the pending offense when the government satisfies the court that the incriminating statements were obtained as an integral part of a legitimate new crimes investigation.

Applying the proposed test to this case, a court might well find that the State was legitimately engaged in a new crimes investigation. The Superior Court made this finding, Pet. App. 48, and the Supreme Judicial Court found this finding supported by ample evidence. Pet. App. 13.

It is the second part of the proposed test that the State can not meet in this case. The incriminating statements obtained from Moulton were not related to the investiga-

tion of threats against witnesses. They were obtained as the result of an independent interrogation of Moulton about the details of the pending crimes. In that way this case is unlike those in which some courts of appeals have held such incriminating statements admissible. *See United States* v. *Darwin*, *supra*; *United States* v. *De Wolf*, *supra*; and *Grieco* v. *Meachum*, *supra*. It is this interrogation which was particularly troubling to the Maine Supreme Judicial Court (Pet. App. 17-19) and which, under *Massiah* and *Henry*, plainly violates the United States Constitution.

CONCLUSION

The incriminating statements obtained by law enforcement agents from Respondent Perley Moulton, Jr. were admitted at trial in violation of Mr. Moulton's Sixth Amendment right to counsel. Accordingly, the decision of the Maine Supreme judicial Court on this issue should be affirmed.

Respectfully submitted,

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